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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 75

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner,

vs.

NACIREMA OPERATING CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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Opinion Below

No opinion was rendered in the District Court.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 236 F. 2d 848 and is printed at pages 118-127 of the Record.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 11, 1956 (R. 127, 128). Timely petitions for rehearing and for rehearing in banc filed on September 20, 1956 were denied on November 5, 1956 (R. 128, 129). The petition for a writ of certiorari was filed on February 2, 1957 and granted on March 11, 1957, 352 U. S. 1030. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Questions Presented

1. Whether a shipowner is entitled to a jury determination of issues of fact in its claim for indemnity against a stevedore, in an action originally brought by a longshoreman employee of the stevedore against the shipowner for personal injuries, sustained when he was struck by a board which fell from a shelter constructed at a prior port by the same stevedore for the exclusive benefit of its longshoremen.

2. Whether a shipowner is entitled to indemnity from a stevedore by reason of the stevedore's negligence in maintaining and using a shelter built by the stevedore, for the sole benefit of the stevedore's longshoremen employees, in a case where a longshoreman recovered damages from the shipowner for personal injuries sustained by reason of the stevedore's use of the shelter in a dangerous condition.

Constitutional Provision Involved

The Seventh Amendment to the Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT

Action was originally brought in this case by William Connolly, a resident of Boston, Massachusetts (R. 5) against petitioner, Weyerhaeuser Steamship Company, a Delaware corporation (R. 6) by reason of personal in-

juries sustained while he was employed as a longshoreman by respondent, Nacirema Operating Co., Inc., a New York corporation (R. 10) on board petitioner's vessel, the SS F E WEYERHAEUSER at Boston, when a piece of board fell on his head while he was working in a lower hold. Jurisdiction was based upon diversity of citizenship of the parties, the amount in controversy being in excess of $3,000 (R. 6).

Petitioner filed a third-party complaint against respondent claiming right of indemnity in the event that it should be held liable to Connolly (R. 10-13).

Jury trial was had before Judge McGohey in the Southern District of New York. At the conclusion of the testimony, petitioner moved for a directed verdict in its favor against respondent. Decision on this motion was reserved. The Court then submitted to the jury only the case of Connolly against petitioner, instructing the jury that the claim over of petitioner against respondent would be submitted to them following their disposition of the case as between the original plaintiff and petitioner (R. 103). The jury returned a verdict in favor of Connolly against petitioner on the first count of the complaint, based on negligence. It returned a verdict in favor of petitioner on the second count of the complaint, based on unseaworthiness. The trial judge then, surprisingly contrary to his earlier instructions (R. 103), directed the jury to return a verdict in favor of respondent against petitioner in the third-party action (R. 117).

Following these verdicts, petitioner moved that the verdict in favor of respondent be set aside and that judgment be entered in favor of petitioner against respondent. Motion was also made in the alternative for a new trial (R. 17-19). The trial court denied all these motions.

Judgment in favor of Connolly against petitioner has been paid and satisfied. An appeal was taken to the Court

of Appeals for the Second Circuit involving only petitioner's claim for indemnity from respondent. Judgment in favor of respondent against petitioner was affirmed by a divided court (R. 118-127).

The SS F. E. WEYERHAEUSER is a Liberty ship, owned and operated by petitioner. She had carried a full cargo of lumber, including a deck load, from the West Coast to New York and then Boston. Discharge of cargo at both New York and Boston was performed by respondent under a standard form of stevedoring contract. The contract provided that respondent would "faithfully furnish" stevedoring services as required by the shipowner and furnish "foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work." The whole reach of the vessel's deck, holds and cargo equipment were turned over to and came under the control of the stevedore for cargo operations (R. 65, 66, 85, 99-101). The deck load and part of the underdeck cargo was discharged at Brooklyn, New York commencing January 25, 1952. The vessel left New York on January 30, 1952 and proceeded to Boston where she arrived on the afternoon of Thursday, January 31.

Discharge of cargo commenced at Boston on the afternoon of January 31st and continued through February 1st, 2nd, 3rd and 4th. The weather at Boston was reasonably good until February 4th, although there was slight precipitation on Saturday, February 2nd. Winds varied from force 1 to 3 on the Beaufort scale and were recorded in the ship's log on Monday, February 4th, at force 2. There was persistent rain on February 4th from the early morning hours.

Four gangs of longshoremen came on board at eight o'clock Monday morning, February 4th. Plaintiff, one of the longshoremen, was working at the bottom of No. 1 lower hold. At about ten o'clock in the morning he was

struck on the head by a piece of wood, which appeared to be a piece of dunnage four or five feet long, eight inches wide and one inch thick (R. 34, 37).

There were no eye-witnesses to the accident among the ship's personnel. The accident was reported to the acting second mate, who on the same date noted the following entry in the ship's log:

> "1000 Piece of wood from winch drivers shelter (built by them) #1 Hatch fell into #1 LH hitting longshoreman William J. Connolly on head. Hatch tender Pat Devine. Man sent out of hold on stretcher. No ship's gear involved in any manner." (Defendant's Exhibit "C", R. 84):

There was testimony from a number of the longshoremen, including the two winch drivers assigned to No. 1 hatch, that at the time of the accident no actual handling of lumber with ship's gear was being performed at that hatch. They said that the only possible place from which the piece of lumber could have come was from the top of a temporary shelter (R. 33, 49, 50) which had been erected over the winches solely for the winch drivers' own convenience and to protect them from the weather (R. 27, 28, 55, 59, 62, 86). They testified that this shelter was made of scrap lumber, nailed together, with a tarpaulin nailed over the top of it. Immediately after the accident, one of the winchmen climbed up on a winch so that he could look at the top of the shelter, which was some seven feet above the deck (R. 28, 34). He then saw a second tarpaulin over the first one. The second tarpaulin was not nailed down but had on it two boards of the same description and dimensions as the one that struck plaintiff (R. 34-37).

The Boston longshoremen insisted that although it was unusual, some of them said unknown, for a ship to come

into a port with longshoremen's shelters already erected, that, nevertheless, this ship did have four such shelters in place when it arrived at Boston four days prior to the accident. They said that although they had arrived prepared to erect a shelter, they had done nothing in connection with construction of this particular shelter and that they had not even examined it carefully or at all (R. 45, 56).

The shelter was not part of the equipment to be supplied by the ship under the terms of the contract (R. 65). It had nothing to do with the working of the ship or its gear (R. 91, 92, 100, 101). Such shelters are built solely for the winch drivers' own personal convenience, are built by them and are always erected regardless of the weather (R. 41-43, 59). The testimony was that such shelters are always erected by longshoremen at all ports in this country, including New York (R. 27, 28, 59, 62, 63).

There was further testimony that upon leaving port it was customary for a ship's crew to tear down such shelters in the process of clearing up or "squaring away" the deck and making the vessel ready for sea. This is ordinarily done for the safety of the seamen in the performance of their duties of handling the vessel at sea and handling lines while making fast to a pier at the end of a voyage (R. 59-61).

The ship's officers specifically denied that any shelters were in place when the ship arrived at Boston. As to this, the jury was instructed that plaintiff's claim would fail unless the accident occurred as described by plaintiff's witnesses and that if the jury should find that the shelters were not in place when the ship arrived at Boston, verdict should be for the defendant (R. 105).

On the disputed evidence, therefore, the jury's verdict established as a fact that the shelter over the winchmen

at No. 1 hatch had been built prior to the ship's arrival at Boston (See R. 105).

There was undisputed testimony from the ship's officers that due to the deck load of lumber it would have been physically impossible for the shelter to have been erected until after discharge of deck cargo at New York (R. 70, 71, 88, 89, 94, 95). As already noted, there was testimony that such shelters are erected at all ports, and it is undisputed that the longshore work at New York, as well as at Boston, was done by respondent, pursuant to the same contract.

There was further undisputed evidence that although strong winds were encountered by the ship on its voyage from New York to Boston the shelter itself could have survived (R. 77, 78).

The instructions of the trial judge and the verdict of the jury have further established that the ship itself and all its appurtenances were seaworthy, that the shelter was not an appurtenance of the ship, but that petitioner was negligent in failing to inspect the shelter and to make sure that there was no loose material on it which could fall from it in such a way as to endanger the longshoremen (R. 105, 106).

The majority of the Court of Appeals, although finding that there was sufficient evidence that the shelter was built by respondent at New York in a careless manner, distinguished the case from *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Corp.*, 350 U. S. 124, by concluding that it was not foreseeable that respondent's improper performance of its duty as a stevedore at New York would result in an injury to a longshoreman at Boston. Judge Lumbard dissented on the grounds that it did not necessarily follow that the chain of causation was broken by petitioner's failure to tear down the shelter at sea; that in any event respondent had a continuing duty at Boston to use in its work reason-

ably safe equipment and reasonably safe methods; that a new risk arose when respondent began to use in Boston the negligently constructed shelter; that responsibility for the dangerous condition rested primarily on the stevedore; that insofar as petitioner was liable only for allowing respondent to use an unsafe shelter its negligence was passive and not active, and that such negligence is comparable to the negligence of the shipowner in the *Ryan* case. It is Judge Lumbard's opinion that in any event the trial judge should have left the issue of respondent's liability to the jury (R. 124-127).

SUMMARY OF ARGUMENT

1. There was substantial evidence that the injuries to a longshoreman, for which petitioner has been held responsible to the longshoreman, were proximately caused by the active negligence of the stevedore-respondent as the primary wrongdoer. Petitioner was at least entitled to a jury determination of the causation issues. *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521.

2. Respondent was primarily at fault in erecting, maintaining and using in its work, solely for its own benefit, a dangerous structure. Petitioner, held liable to one of respondent's employees for injuries caused by this dangerous condition, is entitled to indemnity from respondent for respondent's breach of contractual duty to perform its work properly and safely. *Ryan Stevedoring* v. *Pan-Atlantic SS Corp.*, 350 U. S. 124. On the law and the uncontradicted evidence, there was error not only in the direction of a verdict against petitioner but also in the denial of motion for directed verdict in favor of petitioner.

POINT I

PETITIONER HAS BEEN DEPRIVED OF ITS CONSTITUTIONAL RIGHT TO A JURY TRIAL BY THE DIRECTION OF A VERDICT FOR THE RESPONDENT.

On the basis of the evidence, the Trial Judge's charge, and the jury's verdict against the shipowner, it must be assumed that respondent, petitioner's contracting stevedore, erected a shelter over the ship's winch at New York; that this shelter was supplied by the stevedore solely for use in connection with the performance of stevedore work; and that the shelter was unsafe. Similarly it must be assumed that the jury in finding the shipowner negligent, found as a fact that the winch drivers' shelter was not demolished by the ship's crew after leaving New York; that it was on the ship upon her arrival at Boston, and that respondent's longshoremen used this shelter in connection with their stevedoring operations.

The instructions of the Court and the verdict of the jury have further established that the ship itself and all its appurtenances were seaworthy and that the shelter was not an appurtenance of the ship.

There is no dispute in this case that the shelter was built by longshoremen and was used for their exclusive benefit. The longshoremen and ship's officers and plaintiff's expert seamen all agreed on this. Shelters are regarded as a nuisance by the ship's officers and, on occasion, the chief officer had asked longshoremen not to build them (R. 101). The universal practice of building such shelters at every port, however, continued. The personal use of such shelters is confirmed by the jury's verdict in favor of petitioner on the ground of unseaworthiness, for on the testimony and the Court's charge, the verdict necessarily imports a find-

ing that the shelter was not an appurtenance of the ship (R. 106).

It is also clear that the shelter was within respondent's exclusive control. This is shown by the testimony referred to above and the fact that the ship's officers had no duties in connection therewith during cargo operations. While it is true that a ship's officer remained in charge of the ship as a whole and made occasional rounds to see that cargo operations in general were being properly performed, and while it was occasionally necessary for ship's personnel to oil winches, the safety and seaworthiness of the ship and care and custody of cargo did not require inspection of such a temporary shelter, and none was made.

It further follows that employees of respondent constructed the shelter. Accepting the jury's verdict that the shelter was not built at Boston, it could only have been built by respondent at New York. Such shelters are never built by ship's personnel but are always built by longshoremen. It could not have existed, by reason of the deck load, prior to arrival of the ship at New York and respondent did the stevedoring work at New York (R. 70, 71, 88, 89, 94, 95).

In addition, the only contemporary record in this case, the ship's log, states unequivocally that the shelter was built by the longshoremen (R. 84).

At the trial, counsel for respondent argued that, assuming the truth of the foregoing, there was no evidence as to how the board which struck plaintiff happened to be placed on top of the shelter. As to this, we submit that counsel for respondent was clearly wrong. Plaintiff's evidence tended to show that the board was placed on top of the shelter to hold down a tarpaulin which was loose and supplemental to one nailed in place (R. 34, 49). Clearly, the board was not carelessly thrown up on the shelter to get it out of the way. It was there for a purpose, and it

was there to hold down the loose tarpaulin along with the other two boards. As to this, the longshoremen and the ship's officers all agree that the ship never furnished such a tarpaulin (R. 42, 92, 93, 102). On the contrary, tarpaulins are brought on board or specially obtained by the longshoremen themselves for the purpose (R. 42, 92, 93, 102). It is inconceivable and there was no testimony that a ship's crew would store a small, spare tarpaulin by placing it on top of a flimsy shelter seven feet off the deck and leave it there unfolded and unsecured other than by the weight of three small boards. The master testified that, in fact, the crew did not (R. 82). There can be no doubt that the loose tarpaulin was placed in position by respondent's employees either at Boston or New York and that it was weighted down by the longshoremen.

There is no finding and no evidence as to just when the loose board was placed on the shelter, and, in view of the testimony of the respondent's winchmen, there could be no direct evidence on the point. If the loose tarpaulin was placed in position at Boston, it must have been done by respondent's employees. If it was not placed there at Boston, it must have been put in place at New York, and again, by respondent's employees. This follows as a necessary conclusion from the established facts.

The dangerous situation which resulted in plaintiff's injuries could only have been directly caused by the negligence of respondent's employees in erecting, maintaining and using for their sole benefit a flimsy and dangerous structure.

There was, therefore, substantial evidence in support of the following propositions:

a) The instrumentality that caused the accident was constructed by respondent, was used solely for its benefit and was in its exclusive control.

b) Respondent was negligent in using the shelter at Boston without so much as a casual inspection to ascertain its condition,

c) The primary obligation to furnish the longshoremen a safe place to work rested upon their employer, the respondent,

d) Negligence found on the part of petitioner was merely for breach of a "non-delegable duty" and was passive in nature,

e) The active or primary negligence which caused the accident was solely that of respondent.

These issues were matters for the jury. To deny petitioner at least a jury determination as to the nature of the stevedore's negligence and of the issues of causation was an extreme departure from precedent. In *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, involving a stevedore's obligation to indemnify a shipowner, the New York Court of Appeals said:

> "Where several tort-feasors are involved an implied contract of indemnity arises in favor of the wrong-doer who has been guilty of passive negligence, if there be such, against the one who has been actively negligent. * * * Whether negligence is passive or active is, generally speaking, a question of fact for the jury" (p. 328).

See also *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521; *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523; and see *Seawright* v. *A. Garcia y Cia, Ltda.*, (E. D. Pa. 1956) 138 F. Supp. 881, where it was said at page 884:

> "Without a further jury determination it is impossible to ascertain at this time whether such negligence on the part of the shipowner constituted primary or secondary, active or passive tortious conduct, * * *."

POINT II

PETITIONER SHOULD BE INDEMNIFIED FOR THE LOSS RESULTING FROM RESPONDENT'S BREACH OF CONTRACTUAL OBLIGATION TO DO THE STEVEDORING PROPERLY AND SAFELY.

The verdict for petitioner on plaintiff's count of unseaworthiness has established the fact that the ship was herself seaworthy and, as such, was a safe place in which to work. Creation of a condition constituting an unsafe place to work was, on the jury's findings, solely due to the unsafe condition of the winch shelter. This was erected by respondent's employees after control of discharging operations was turned over to this independent contractor.

It matters not whether the shelter was erected by respondent's longshoremen at New York or at Boston, because this structure was built by and solely for the use of respondent's employees in the course of their work and, even if built by them at New York, it was adopted again by them at Boston. It was not an appurtenance of the ship, it was not a part of the equipment to be furnished by the ship under the stevedoring contract (R. 65) and it can not be considered as having been furnished by petitioner to respondent.

Since petitioner was under a non-delegable duty to furnish a safe place for the longshoremen to work, and although the ship was safe but for respondent's erection of an unsafe structure, the jury found, on the Court's instructions, that petitioner was negligent in that the ship's officers took no affirmative steps to inspect it and to see that it was in all respects secure. As to this, the Trial Court summarized in its charge to the jury as follows:

> "Going back for a minute to the negligence against the ship you would have to find, for instance, that they had an opportunity to see that structure,

that they did see it and they took no steps to make it fast and to keep that wood down there." (R. 106).

As this shelter was unsafe, it necessarily follows that the direct cause of the accident was the active negligence of respondent in the construction, maintenance and use of the shelter.

In these circumstances petitioner is entitled to indemnity from respondent by reason of breach by respondent of its contractual obligation to do its work in a safe manner. *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Corp.*, 350 U. S. 124, 133.

The present case parallels very closely the circumstances of the *Ryan Stevedoring* case. In *Ryan*, the same stevedoring company loaded a vessel at one port and discharged it at a second port. The stowage was negligent by reason of failure to properly chock rolls of paper pulp, and this negligence was the direct cause of an injury to a longshoreman who was caught by one of the rolls of paper in the course of discharge. There was further evidence that the stowage and the discharge was under the general supervision of the ship's officers.

The shipowner, although held liable to the longshoreman, was, nevertheless, held entitled to indemnity from the stevedore for the latter's breach of its warranty of workmanlike service which was of the essence of the stevedoring contract.

In the present case, if the loose tarpaulin and hold-down boards were placed in position at Boston, the liability over of respondent is obvious. If the board was not placed on the shelter at Boston, then it was placed there at New York, and we then have the exact *Ryan Stevedoring* situation: a negligent act by the stevedore at one port, which created a dangerous situation and directly caused an injury to a longshoreman employee of the same stevedore at a second port, with the shipowner held responsible in the

first instance under its non-delegable duty to the longshoreman in respect of a condition created by the stevedore's active negligence.

In the majority opinion of the Court of Appeals, the *Ryan Stevedoring* case is differentiated on the theory that in performance of the shipowner's stevedoring requirements it was implicit that the stevedoring contractor agreed to indemnify the shipowner only for "foreseeable damages resulting from the contractor's improper performance of these requirements". We submit that the case is not distinguishable on this ground and that the *ratio decidendi* is the same. Judge Lumbard in his dissenting opinion agrees that the case at bar is, in fact, governed by *Ryan*.

In the first place it seems clear that the matter of "foreseeable damages" is one which should have been submitted to the jury. *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521. In addition there was no breach of any duty owed by petitioner to respodent with respect to the removal of the shelter. Shelters are torn down at sea by reason of danger to members of the crew rather than by reason of any ultimate danger to longshoremen at a subsequent port, who, in the ordinary course of things, would be expected to rebuild the shelter at the next port (R. 59, 60). As between petitioner and respondent, there was no actionable negligence on the part of petitioner. Furthermore, as stated by Judge Lumbard,

> "Where a person negligently creates a risk of harm, he is not ordinarily permitted to escape liability merely because he assumed that someone else would, in the performance of an independent duty, terminate or protect against the risk which he created. Cf. Restatement of Torts §§ 447, 452." 236 F. 2d 848, 852 (R. 125).

The test of foreseeability applied in the majority opinion of the Court of Appeals is entirely inapplicable to the

active negligence of respondent in using the unsafe structure at Boston without so much as a casual inspection to ascertain its condition. A new risk arose at that time and any possible prior negligence of petitioner must be regarded, as between the present parties, as a condition rather than a cause.

Again, as in the *Ryan* case, it is unnecessary to consider the line of authorities which support the right of indemnity on the common law concepts of primary and secondary or active and passive tortious conduct. We have here the same contractual obligation of the stevedore to perform its work in a safe manner and a resulting right of indemnity for breach of this contractual obligation. The right of indemnity furthermore is not defeated by any obligation of the shipowner to supervise the cargo work or right to require correction of any unsafe practice. As to this, this Court said:

> "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach." (350 U. S., at pages 134, 135).

On the undisputed facts and on the applicable law, petitioner is entitled to indemnity from respondent.

In this brief we have pointed out that on the law and on the evidence petitioner was entitled at least to a jury determination of the issues under its claim for indemnity and that the Trial Court erred in directing the verdict in favor of respondent as against petitioner. We further submit that on the law and on the undisputed evidence the Trial Court

not only erred in directing a verdict against petitioner, it also erred in denying petitioner's motion for a directed verdict against respondent. The only conflict in the evidence was whether the winchman's shelter was constructed before or after the vessel arrived at Boston. This conflict having been resolved by the jury verdict, no dispute in the testimony remains. While it is ordinarily the province of the jury to draw such inferences as are necessary from the evidence before it, in the present case only one rational inference could have been drawn: that respondent's breach of duty was the sole proximate cause of the accident.

CONCLUSION

The judgments of the United States Court of Appeals for the Second Circuit and of the District Court of the United States, Southern District of New York, should be reversed and the case should be remanded to the District Court with direction that judgment be entered in favor of petitioner against respondent. In the alternative a new trial should be granted petitioner on its third-party complaint against respondent.

Respectfully submitted,

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